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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 626

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, NEW YORK COUNTY, AND BRIEF IN SUPPORT THEREOF.

FREDERICK H. KOSCHWITZ,
Counsel for Petitioners.

JOHN F. X. FINN,
VERNON C. RYDER,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No.

AMERICAN SCOTTI CORPORATION and S. A. SCOTTI & C. OF MONZA, ITALY,

Petitioners,

—against—

HENRY POLLAK, INC.,

Respondent.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended (28 U. S. C. A., Section 344 (b)), and Supreme Court Rule 38, par. 5 (a).

STATUTE INVOLVED.

Section 3477 of the United States Revised Statutes (31 U. S. C. A., Sec. 203). The specific portion of the Statute more particularly involved reads as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration

therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

Summary Statement.

Petitioner S. A. Scotti & C. of Monza, Italy (hereinafter called Scotti of Monza), is an Italian Corporation, located in Monza, near Milan, Italy. It is engaged in the manufacture of wool felt hat bodies, referred to in the trade as "wool felts". American Scotti Corporation (hereinafter called American Scotti) is Scotti of Monza's wholly owned American subsidiary. It was organized in New York in 1929, and from that time until November, 1932, was actively engaged in the importation of wool felts into the United States (Min., pp. 5-6).

When American Scotti ceased actively to do business in 1932, Scotti of Monza entered into a contract with the respondent whereby respondent became the exclusive United States sales agent of Scotti of Monza and the liquidator, on a commission basis, of the unsold merchandise of American Scotti (Min., pp. 10, 455-456; Ex-

hibits A and B annexed to Defendant's Answer, Judgment Roll.

During American Scotti's active business existence, protests had been filed against the rate of duty being exacted on its importations of wool felts (Min., pp. 3, 92). A successful prosecution of those protests would result in refunds to the Company of about $100,000. After November, 1932, respondent, acting as the agent of Scotti of Monza, imported similar merchandise on consignment for the account of its said principal. Similar protests were filed with respect to those importations, and, if allowed, would entitle Scotti of Monza to about $50,000 of refunds (Min., pp. 3, 617, 646, 660-686).

Shortly prior to November 7, 1935, respondent and Scotti of Monza exchanged cables looking toward the purchase by respondent of plaintiffs' remaining stock of merchandise in the United States (Min., pp. 70, 124-133; Pltffs'. Exs. 3, 5, 6, Min., pp. 22, 23). A price of $10,000 was agreed upon. Before cabling his acceptance, one Maurice Pollak, the president of respondent company, called to his office one Scarpa, a former employee and the secretary of American Scotti (Min., pp. 454, 36). He requested Scarpa to cable Scotti of Monza for authorization to sign an agreement with respect to future liquidations of customs entries whereby respondent would assume liability for any additional duties and petitioners would renounce in respondent's favor any refunds resulting from such liquidations (Min., pp. 38, 498-500). The ensuing exchange of cables between Scarpa and Scotti of Monza, whereby such authorization was requested and given, was restricted to future liquidations of customs entries and made no mention of the reliquidation refunds which were the subject matter of the protests mentioned above (Pltffs'. Exs. 6, 7-A, 7-B, 8-A, 8-B, Min., pp. 23, 34, 35). At the trial proof was adduced of the distinction

between liquidation refunds in ordinary course and reliquidation refunds pursuant to court order (Min., pp. 203-208).

The sale of said merchandise was evidenced by a letter form of agreement, which was prepared in Pollak's office and signed by him on behalf of respondent and by Scarpa on behalf of the petitioner (Pltffs'. Ex. 9, Min., pp. 44-45). The letter, dated November 7, 1935, is printed in full in Appendix A to Petitioners' Brief hereto, pages 29-30, thereof. The third paragraph of said letter reads as follows:

> "Likewise, it is understood that, in reference to duties, any refunds accruing on all Felts imported by American Scotti Corporation, or ourselves for account of American Scotti Corporation or for account of S. A. Scotti & Company of Monza, are for account of Henry Pollak, Inc., and that, likewise, any additional duties that may be imposed are for account of Henry Pollak, Inc."

It is undisputed in this action that the execution of said letter form of agreement was attended by none of the formalities prescribed by Section 3477 of the United States Revised Statutes, and was not executed after the allowance of plaintiffs' said claims against the Government and the ascertainment of the amounts due; and that it does not recite the issuance of any warrant for payment thereof.

Subsequently in about July, 1940, the customs litigation with respect to protests on wool felts was determined in favor of the importers (Min., p. 312). By reason thereof and the consequent reclassification of petitioners' merchandise, the entries of wool felts by or for the account of each of these petitioners were reliquidated and the petitioners became entitled to various refunds of customs duties in the total amount of about $150,000 (Min., pp. 3-4,

699; Deft.'s Ex. A., Min., p. 2). Those refunds, which would otherwise have been the property of the petitioners, were claimed by the respondent on the strength of the third paragraph of said letter form of agreement set forth above (Defendant's Answer, Judgment Roll, pars. 4, 10).

Petitioners brought an action in the Supreme Court of the State of New York, County of New York, to be adjudged the owners of said reliquidation refunds claiming, among other things, that if said letter form of agreement was asserted to contain an assignment of said refunds, the same was void under said Section 3477. On motion of the respondent, a Receiver was appointed to collect and hold, subject to the further order of the Court, the refunds payable to American Scotti. The refunds payable to Scotti of Monza were not affected by said Receivership (Deft.'s Ex. B, Min., p. 2). The Receiver collected $104,473.12 of such refunds on importations made in its name for the account of petitioner Scotti of Monza (Min., pp. 3-4, 699; Deft.'s Ex. A, Min., p. 2).

Shortly after the commencement of this action, petitioners moved for judgment on the pleadings. The motion was denied, with an opinion which was not officially reported but which is printed as Appendix B to Petitioners' Brief hereto (pp. 31-34 thereof). Upon appeal to the Appellate Division of said Supreme Court, First Department, said order of denial was affirmed (259 App. Div. 878).

Thereafter the case was tried by the Court without a jury and judgment was entered for the respondent with an opinion which was not officially reported but which is printed as Appendix C to Petitioners' Brief hereto (pp. 35-36, thereof).

On appeal to the Appellate Division, said judgment was unanimously affirmed, without opinion (257 App. Div. 890).

The Appellate Division denied leave to appellants to appeal to the Court of Appeals (267 App. Div. 954). Thereafter petitioners moved before the Court of Appeals for leave to appeal to said Court and to have such appeal heard on the original record, but by order entered in the office of the Clerk of said Court of Appeals on July 19, 1944, said motion was denied (295 New York Reports, no page number having yet been assigned; Weekly Advance Sheets, September 16, 1944).

As stated above, the Appellate Division in affirming the judgment below rendered no opinion. The opinion of the Trial Justice, however, makes it clear that in upholding the validity under R. S. Section 3477 of the alleged assignment herein, he was relying upon *Martin* v. *National Surety Company*, 300 U. S. 588, as having overruled this Court's previous decision in *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

Petitioners have maintained throughout this litigation that the *Martin* case was expressly limited to the special circumstances there involved and is not susceptible to the broad construction which the lower Court placed upon it. It is respondent's contention that this Court, by its decision in the *Martin* case, did not intend to overrule *National Bank of Commerce* v. *Downie*, which held that assignments like that at bar are "absolutely null and void".

Questions Presented.

(1) Whether the decision in the case of *Martin* v. *National Surety Company*, 300 U. S. 588, overrules the long line of decisions of this Court epitomized by *National Bank of Commerce* v. *Downie*, 218 U. S. 345.

(2) Whether the assignment relied on by the respondent in this case is void under said Section 3477 of the United States Revised Statutes.

The Federal question here involved was first raised by Petitioners in their complaint in this action (Judgment Roll, Complaint, pars. XIV-XVI). It was the basis of Petitioners' motion for judgment on the pleadings herein and was considered at length in the Court's opinion in deciding said motion (Appendix B to Petitioners' Brief, p. 31-34, thereof). It was again raised at the trial of the action (Opinion of Trial Justice, Judgment Roll; Appendix C to Petitioners' Brief hereto, pp. 35-36 thereof). The question was also argued and fully briefed before the Appellate Division and was again the basis for Petitioners' application for leave to appeal to the Court of Appeals.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the lower Court is contradictory to the decisions of this Court holding invalid assignments of the nature involved in the instant case.

(2) The decision of the lower Court is contradictory to the previous decisions of the Courts of New York State which, since *National Bank of Commerce* v. *Downie*, 218 U. S. 345, have consistently applied the rule enunciated by this Court in that case.

(3) The lower Court has misinterpreted and misapplied the decision of this Court in *Martin* v. *National Surety Company*, 300 U. S. 588.

(4) A determination of the questions here presented will remove the uncertainty and confusion which exists

among the decisions of the State and Federal Courts with respect to the interpretation of the *Martin* case.

(5) The legislative history of the Assignment of Claims Act of 1940, amending Section 3477, indicates Congressional understanding that *National Bank of Commerce* v. *Downie* correctly represents the present state of the law under said section.

(6) The public interest and the interest of the United States Government will be promoted by prompt settlement by this Court of the questions here involved.

Wherefore, your petitioners pray that a writ of certiorari be issued by this Court directed to the Supreme Court of the State of New York, County of New York, to the end that the said judgment of the Appellate Division of said Supreme Court, First Department, in said cause entitled *American Scotti Corporation and S. A. Scotti & C. of Monza, Italy*, plaintiffs, against *Henry Pollak, Inc.*, defendant, Docket No. 28551—1938, be reviewed by this Court as provided by law, and that, upon such review, said judgment be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

Dated: New York, October 17, 1944.

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